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**UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

TEXAS DENTAL ASSOCIATION

and

NATHAN CLARK, an Individual

and

**BARBARA JEAN LOCKERMAN,
an Individual**

and

PATRICIA ST. GERMAIN, an Individual

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**Cases Nos. 16-CA-25349
 16-CA-25445
 16-CA-25383; and
 16-CA-25840.**

**RESPONDENT'S MOTION FOR RECONSIDERATION, MOTION TO REOPEN THE
RECORD, AND BRIEF IN SUPPORT**

TO THE NATIONAL LABOR RELATIONS BOARD:

Respondent Texas Dental Association ("TDA") respectfully moves the Board to reconsider its decision that TDA committed an unfair labor practice by discharging Nathan Clark and that Barbara Lockerman, a supervisor, was discharged for refusing to commit an unfair labor practice. In addition, TDA moves the Board to reopen the record for the limited purpose of taking evidence on whether reinstatement would pose an undue economic burden on TDA. In support, TDA would show the Board the following:

1. TDA did not commit an unfair labor practice by discharging Mr. Clark.
2. No evidence supports the conclusion that Ms. Lockerman was discharged for refusing to commit an unfair labor practice.
3. Since Ms. Lockerman's discharge in 2006, the economic downturn has caused TDA to downgrade and eliminate supervisory positions, such that it would be an

economic hardship for TDA to be required to create a supervisory position for Ms. Lockerman that would be substantially equivalent to her former position.

4. Since Mr. Clark's discharge in 2006, his former position has been downgraded, such that it would be an economic hardship for TDA to be required to create a position for Mr. Clark that would be substantially equivalent to his former position.

I. Argument and Authorities

A. Exception 1: TDA did not commit an unfair labor practice by discharging Nathan Clark.

TDA excepts to the Board's finding that TDA's discharging Mr. Clark was an unfair labor practice, Decision at 1, for the reasons set forth in its Exceptions and Brief in Support to the decision of the Administrative Law Judge, specifically exceptions Nos. 1, 2, 3, 4, 5, 9, 10, 12, 13, 14, 15, 16, 17, 18, and 19, which are incorporated herein by reference for all purposes.

B. Exception 2: The evidence does not support the finding that Ms. Lockerman was discharged for refusing to commit an unfair labor practice.

TDA excepts to the Board's finding that "the sole reason for [discharging Ms. Lockerman] was her failure to divulge to Linn what Lockerman knew of the employees' protected concerted activities, Decision at 2; that TDA "unlawfully discharged Lockerman for refusing to participate in its reasonably evident quest to identify and terminate employees involved in protected concerted activity," Decision at 3; and that Ms. Lockerman's discharge "was, in substance, a termination because Lockerman failed to cooperate with [TDA's] unlawful endeavor," for the reasons set forth in its Exceptions and Brief in Support to the decision of the Administrative Law Judge, specifically exceptions Nos. 1, 6, 8, 11, 20, 21, and 22, which are incorporated herein by reference for all purposes. TDA also excepts to the Board's characterizing its actions as "antiunion efforts," Decision at 4, because there simply is no

testimony or other evidence that the employees were engaged in anything having to do with forming a union.

Further, the Board's findings, like the ALJ's, rest on an incorrect analogy to the facts of *Howard Johnson Motor Lodge*, 261 NLRB 866 (1982), *enfd.* 702 F.2d 1 (1st Cir. 1983). Unlike the facts in *Howard Johnson Co. v. NLRB*, 702 F.2d 1, 3-4 (1st Cir. 1983), where the employer repeatedly questioned a supervisor concerning who attended a union meeting, and terminated her for failing to disclose names, Ms. Lockerman was never even questioned. The evidence is that Ms. Linn wanted to know what the employees' concerns were. See hearing Exhibit GC-9 ("In order to allow one more opportunity to discuss any concerns within appropriate channels, I expect that *anyone who has participated* in any way in these anonymous communications to call or e-mail me by the end of this week to schedule an appointment..."") (emphasis added). Ms. Linn's memo to the staff did not require those with knowledge to come forward, but only those who had participated. As Ms. Lockerman testified, she had not participated in the petition's creation, its dissemination, or Mr. Clark's e-mailing it to members of TDA's Board of Directors and other member dentists. Thus, Ms. Linn's e-mails cannot be read as a requirement that Ms. Lockerman, "someone with knowledge" come forward, but only those who participated.

What happened was that Ms. Lockerman innocently acquired knowledge of Clark's plans to create a disruption at the annual session and disloyally failed to warn Ms. Linn. When Ms. Linn later discovered that disloyalty through reports from two other directors, she terminated Ms. Lockerman, never once asking – as in *Howard Johnson* – for her to reveal the names of those involved. Thus, the proper analogy is to *P.R. Mallory Co., Inc.*, 175 NLRB 308, 313 (1969); *J.W. Mays, Inc.*, 147 NLRB 942, 948 n. 12 (1964), not to *Howard Johnson*. In *Mallory*, a three-member panel of the Board found no evidence that the employer had terminated its supervisor

because of his refusal to spy on and report on employees regarding their union activity. 175 NLRB at 313. Rather, the supervisor had been discharged, at most, “for not reporting to [the employer] information about employee union activity that he had innocently acquired,” which is not a violation. *Id.* Here, Ms. Lockerman’s failure to alert Ms. Linn to the employee’s plans – information she had innocently acquired – was the legitimate reason for her discharge.

Further, there is no evidence that the discharge was motivated by Ms. Lockerman’s refusal to commit an unfair labor practice. Because it would not have been an unfair labor practice for her to voluntarily disclose what she had learned innocently, it cannot be an unfair labor practice to terminate her employment upon the discovery that she had concealed information that might have allowed Ms. Linn to avoid the disruption of the annual meeting. Because supervisors are not employees – and thus are not protected by the Act – their employment is protected only if their discharge was part of an effort by the employer “to thwart the exercise of section 7 rights by protected rank-and-file employees.” *Kenrich Petrochemicals, Inc. v. N.L.R.B.*, 907 F.2d 400, 406 (3d Cir. 1990) (en banc) (citations omitted). Here, no facts support a conclusion that Ms. Lockerman’s discharge was meant to thwart the exercise of the employees’ section 7 rights. Not only was Ms. Lockerman *never questioned* about her knowledge of the employees’ actions or identities, but there is no evidence that the reason for her discharge was ever communicated to any rank-and-file employee, or even that any rank-and-file employee ever knew of the reasons. Thus her discharge communicated nothing concerning the exercise of section 7 rights to TDA’s rank-and-file employees.

C. Exception 3 (Motion to Reopen the Record): Lockerman's reinstatement should not be ordered because, in the current economic downturn, it would be unduly economically burdensome.

Although "the Act has granted the Board wide discretion in fashioning remedies," *N.L.R.B. v. Otis Hosp.*, 545 F.2d 252, 257 (1st Cir. 1976) (quoting *Virginia Elec. & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540, 63 S.Ct. 1214, 87 L.Ed. 1568 (1943)), an order for reinstatement may be vacated if reinstatement would constitute an undue economic burden. *Pan American Grain Co. v. N.L.R.B.*, 558 F.3d 22, 29 (1st Cir. 2009) (cites omitted). "[R]einstatement is an inappropriate remedy if it would be 'unduly economically burdensome for the employer.'" *Regal Cinemas, Inc. v. N.L.R.B.*, 317 F.3d 300, 315 (D.C.Cir. 2003) (quoting *Teamsters Local Union No. 171 v. N.L.R.B.*, 863 F.2d 946, 957-58 (D.C.Cir. 1988)).

It is the employer's burden to produce evidence that reinstatement would be unduly burdensome. Here, in the three years that have passed since Ms. Lockerman and Mr. Clark were discharged, TDA has undergone significant reorganization. See Exhibit 1, attached hereto and incorporated herein by reference. According to the 2006 and 2009 organization charts, Exhibits 1.a and 1.b, in 2006 there were 33 staff positions, three of which then were vacant (director of TDA Smiles Foundation, receptionist, and director of Department of Ethics and Dental Benefit Services). Of these 33 positions, four overlapped: Laura Haufler, head of the Department of Finance, also served as liaison to TDA Holdings, and Sarah Faber, administrative assistant of the Smile Foundation, was also an administrative assistant for Paid Dental. Thus, in 2006, TDA had 31 employees, one of which (the meetings assistant in the Department of Annual Session & Meeting Services) was part-time. *Id.*

By contrast, in 2009, there are 33 staff positions, all but one of which are filled, four that overlap, and two that are part-time. *Id.* DeeDee Delagarza, head of the Department of Finance,

acts as liaison to TDA Holdings, just as Laura Haufler did in 2006, but now David Baker serves as general manager of both Paid Dental and Financial Services. The meetings associate position in the Department of Annual Session & Meeting Services and the administrative assistant position in the TDA Smiles Foundation are both part-time. *Id.*

In addition, TDA anticipates that further reductions in force may be necessary. Some member dentists have informed TDA that the income from their practices has declined nearly 30 percent, which could lead to a drop in TDA membership. Exhibit 1.

In 2006, TDA Holdings, Inc. was the sole shareholder of two for-profit subsidiaries, Financial Services, Inc., for which Ms. Lockerman served as general manager, and Paid Dental Benefits, Inc., for which David Baker served as general manager. Both general manager positions were supervisor positions. Following Ms. Lockerman's discharge, her duties were consolidated with Mr. Baker's. In 2008, however, the Paid Dental board voted to inactivate Paid Dental; its sole shareholder, TDA Holding Company, agreed.

The decision was made because Paid Dental's revenue had declined 64 per cent between 2006 and 2007 and had declined another 87 per cent between 2007 and 2008. Because of the inactivation of Paid Dental, Mr. Baker's duties now are the duties that Ms. Lockerman once performed. In order to reinstate Ms. Lockerman to her former position, Mr. Baker would have to be discharged, despite his exemplary service. *Id.* Alternatively, because there is no other "substantially equivalent" position, TDA would have to create one that it does not need for its operations if the Board's order of reinstatement stands.

The one position that TDA has open, policy analyst, is not a supervisory position and thus is not "reasonably equivalent" to Ms. Lockerman's former position. All of these developments occurred subsequent to the hearing, could not have been included in the evidence

at the time, and could have led to an order that did not include reinstatement. Accordingly, TDA respectfully requests that the record be reopened so that evidence of the undue economic burden of reinstatement can be presented.

D. Exception 4 (Motion to Reopen the Record): Mr. Clark's reinstatement should not be ordered because it would be unduly economically burdensome.

For the same reason, TDA objects to the order to reinstate Mr. Clark. He was employed in TDA's Department of Finance as a finance coordinator. That position has been downgraded to staff accountant and no longer requires the computer skills and duties that were part of Mr. Clark's duties. *Id.*; compare Exhibit 1.c with Exhibit 1.d. To reinstate Clark would require discharging the person who now holds the position of Staff Accountant and upgrading that position to something TDA no longer needs, or creating a new position that TDA does not need and cannot sustain, in view of the likelihood that it will have to reduce its staff further, if revenues decline in the coming year as is anticipated. The one open staff position, policy analyst, requires experience working with the Texas Legislature to advance TDA's legislative goals. It is a position for which Mr. Clark, who has no such experience, is unqualified. *Id.*

All of these developments occurred subsequent to the hearing, could not have been included in the evidence at the time, and could have led to an order that did not include reinstatement. Accordingly, TDA respectfully requests that the record be reopened so that evidence of the undue economic burden of reinstatement can be presented.

II. Request for Relief

For these reasons, Respondent respectfully requests that the Board sustain its special exceptions or, in the alternative, that it reopen the record so that evidence of the undue economic burden of reinstatement can be presented, and that the Board grant such other relief to which TDA may show itself entitled.

Respectfully submitted,

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By: 
Lin Hughes

*ATTORNEYS FOR TEXAS DENTAL
ASSOCIATION*

CERTIFICATE OF SERVICE

I herby certify that on August 25, 2009, a true and correct copy of the above was filed electronically through the Board's e-filing system. In addition, the original and eight paper copies were sent via overnight mail to:

Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W
Washington, D.C. 20570-0001

Copies were also sent via regular mail to:

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National Labor Relations Board
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H.F. Garcia Federal Building & US Courthouse
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Austin, Texas 78749



Lin Hughes

EXHIBIT 1

5. As the custodian of the Exhibits, I have personal knowledge of those files. The Exhibits are kept by TDA in the regular course of its business; it was TDA's regular course of business for a TDA employee with knowledge of the act, event, condition, or opinion, recorded to make the Exhibits or to transmit information thereof to be included in such Exhibits; the Exhibits were made at or near the time of the event recorded or reasonably soon thereafter. The Exhibits are the original or exact duplicates of the documents they purport to be.
6. In the three years that have passed since Barbara Lockerman and Nathan Clark were discharged, TDA has undergone significant reorganization. As shown by the 2006 and 2009 organization charts, Exhibits 1.a and 1.b, in 2006 there were 33 staff positions, three of which then were vacant (director of TDA Smiles Foundation, receptionist, and director of Department of Ethics and Dental Benefit Services). Of these 33 positions, four overlapped: Laura Haufler, head of the Department of Finance, also served as liaison to TDA Holdings, and Sarah Faber, administrative assistant of the Smile Foundation, was also an administrative assistant for Paid Dental. Thus, in 2006, TDA had 31 employees, one of which, the meetings assistant in the Department of Annual Session & Meeting Services, was part-time.
7. By contrast, in 2009, there are 33 staff positions, all but one of which are filled, four that overlap, and two of which are part-time. DeeDee Delagarza, head of the Department of Finance, acts as liaison to TDA Holdings, just as Laura Haufler did in 2006, but now David Baker serves as general manager of both Paid Dental and Financial Services. The meetings associate position in the Department of Annual Session & Meeting Services and the administrative assistant position in the TDA Smiles Foundation are both part-time.

8. In addition, TDA anticipates that further reductions in force may be necessary. Many member dentists have informed TDA that the income from their practices has declined nearly 30 percent, which could lead to a drop in TDA membership.
9. In 2006, TDA Holdings, Inc. was the sole shareholder of two for-profit subsidiaries, Financial Services, Inc., for which Ms. Lockerman served as general manager, and Paid Dental Benefits, Inc., for which David Baker served as general manager. Both general manager positions were supervisor positions. Following Ms. Lockerman's discharge, her duties were consolidated with Mr. Baker's. In 2008, however, the Paid Dental board voted to inactivate Paid Dental; its sole shareholder, TDA Holdings, Inc., agreed.
10. The decision was made because Paid Dental's revenue had declined 64 per cent between 2006 and 2007 and had declined another 87 per cent between 2007 and 2008. Because of the inactivation of Paid Dental, Mr. Baker's duties now are the duties that Ms. Lockerman once performed. In order to reinstate Ms. Lockerman to her former position, Mr. Baker would have to be discharged, despite his exemplary service. Alternatively, because there is no other "substantially equivalent" position, TDA would have to create one that it does not need for its operations if the Board's order of reinstatement stands.
11. All of these developments occurred subsequent to the hearing and could not have been included in the evidence at the time.
12. Mr. Clark was employed in TDA's Department of Finance. That position has been downgraded to staff accountant and no longer requires the computer skills and duties that were part of Mr. Clark's duties. Compare Exhibit 1.c with Exhibit 1.d. To reinstate Clark would require discharging the person who now holds the position of Staff Accountant and upgrading that position to something TDA no longer needs, or creating a new position that

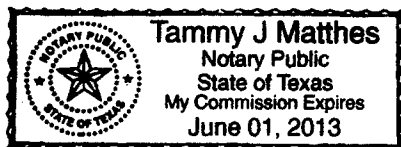
TDA does not need and cannot sustain, in view of the likelihood that it will have to reduce its staff further, if revenues decline in the coming year as is anticipated. The one open staff position, policy analyst, requires experience working with the Texas Legislature to advance TDA's legislative goals. It is a position for which Mr. Clark, who has no such experience, is unqualified.

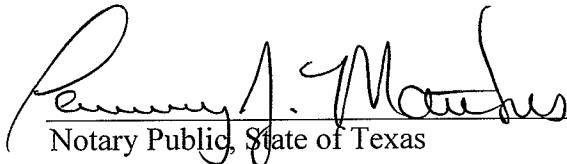
13. All of these developments occurred subsequent to the hearing and could not have been included in the evidence at the time. Accordingly, TDA respectfully requests that the record be reopened so that evidence of the undue economic burden of reinstatement can be presented.

Further affiant sayeth not.


Mary Kay Linn

SWORN TO AND SUBSCRIBED BEFORE ME by the said Mary Kay Linn on this the 25th day of August, 2009, to certify which, witness my hand and seal of office.




Notary Public, State of Texas

Tammy J. Matthes
(Printed or Stamped Name of Notary)

My Commission Expires: 6/01/2013

EXHIBIT 1.a

TDA Central Office Organization Chart

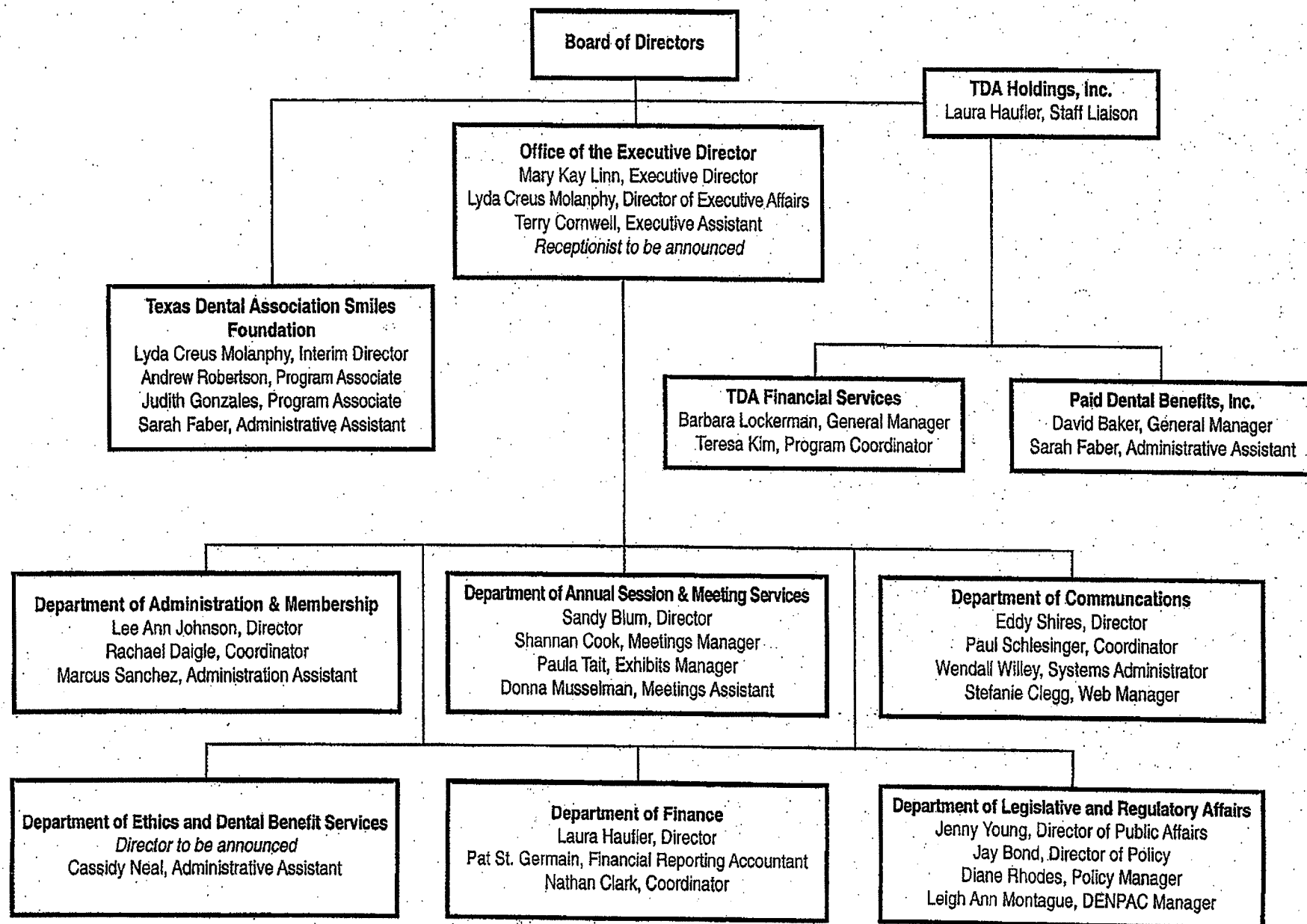


EXHIBIT 1.b

TDA Central Office Organization Chart

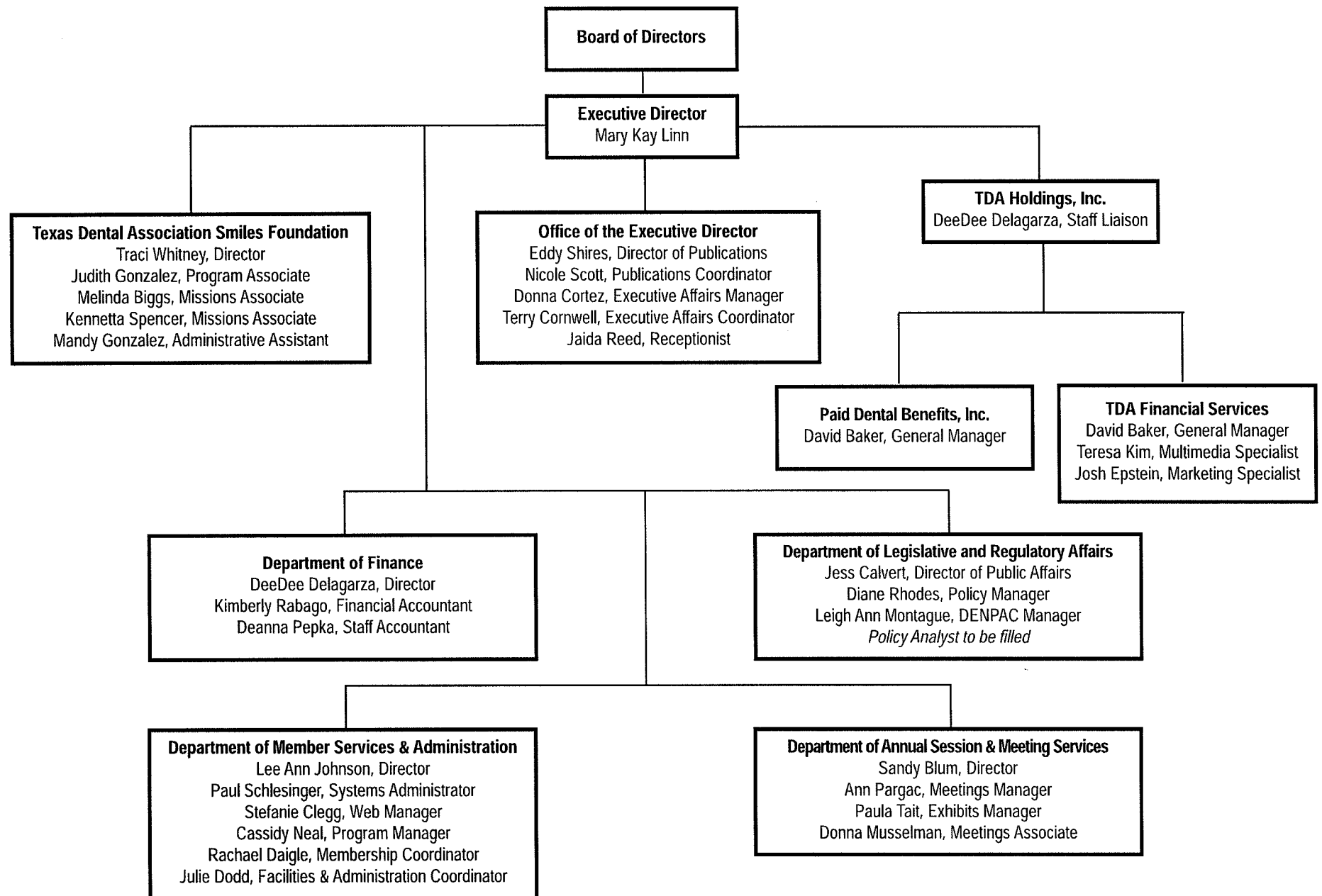


EXHIBIT 1.c

**Texas Dental Association
Position Description**

Title: Finance Coordinator

Report to: Primary – Director of Finance
Secondary – Executive Director

Summary: This position will serve as support to the Department of Finance. General accounting knowledge and technical skills will be utilized to carry on the financial functions of the department. Skills in database design and maintenance as well as extensive knowledge of report writing and data retrieval are also utilized.

Qualifications: Background in accounting acquired through education and/or experience. Expertise in report writing and database administration. Must be detail oriented, self-motivated, and possess excellent interpersonal skills. Must have the ability to work independently, including establishing and meeting goals and meeting departmental and company deadlines.

Duties:

Process all check requests, invoices and statements for payment through accounts payable system on a weekly basis. The accounts payable process includes obtaining proper authorization, correct coding of expenditures, obtaining signature(s) for checks, reporting checks to the bank through the positive pay system, and distribution of payments on a timely basis. Maintain communication with vendors for resolving billing discrepancies and negotiation of better pricing if possible. Vigilantly look for new ways to reduce company costs through review and comparison of vendors providing similar services in the local market.

Process all travel reimbursement vouchers through the Access database with payment through the Accounts Payable system under the travel guidelines established by the Board of Directors. Maintenance of the Access database includes maintaining records for meetings and board and staff members.

Process monthly member dues payments of the prepayment plan utilizing Excel, PC Authorize and Frost Banking software. Reconcile transactions monthly and update member records as required. Reconcile accounts at year-end for dues posting in Semarca.

Process credit card transactions through PC Authorize on a weekly basis, and as needed during dues collection months of November through April.

Review and reconcile payment transactions received through Website based on established procedures.

Work in conjunction with Director of Finance to develop reports in Crystal for analysis of the Semarca membership data and the SBT general ledger data. Assist other departments, as needed, with development of new reports in Crystal.

Work on special projects using skills in database creation, including creation of specialized databases for cash receipts, 1099s, Annual Session Events, etc.

Work in conjunction with Director of Finance and Staff Accountant to develop procedures for the Finance department to process transactions in a timely and accurate manner.

nk Update member records in Semarca during dues collections months as needed.

Join with other staff, taking shifts to provide back-up phone duty service when receptionist is out of office.

On an annual basis change over filing system to current year by moving 2 year old records to storage and setting up new year's files

Process 1099's annually per established procedures. Create and maintain Access database as backup for ACCPAC software while it cannot generate accurate 1099s.

Assist in providing information as requested for annual audit.

Maintain all files for accounts payable, travel reimbursement vouchers and cash receipts.

Assist Director of Finance and Executive Director as requested.

EXHIBIT 1.d.

**Texas Dental Association
Position Description**

Title: Staff Accountant

Report to: Primary – Director of Finance
Secondary – Executive Director

Summary: This position will serve as support to the Department of Finance. General accounting knowledge and technical skills will be utilized to carry on the financial functions of the department.

Qualifications: Background in accounting acquired through education and/or experience.

Duties:

Process all check requests, invoices and statements for payment through accounts payable system on a weekly basis for eight entities. The accounts payable process includes obtaining proper authorization, correct coding of expenditures, obtaining signature(s) for checks, and distribution of payments on a timely basis. Coding requires knowledge of budgets for all entities and understanding relationships between these entities. Maintain communication with vendors for resolving billing discrepancies.

Process all travel vouchers through the Access database with payment through the Accounts Payable system per the TDA travel policy. Maintenance of the Access database includes maintaining records for meetings and board and staff members. Correct allocation of cost requires knowledge of funding activities and budget of each entity.

Process monthly member dues payments of the prepayment plan and monthly contribution commitments utilizing Excel, PC Authorize and Frost Bank Cash Manager software. Reconcile transactions monthly and update member records as required. Reconcile accounts at year-end for dues posting in Semarca membership software.

Process credit card transactions through PC Authorize on a weekly basis, and as needed during dues collection months of November through April.

Record cash receipts through Great Plains Bank Reconciliation module. Maintain cash receipts and revenue records. Reconcile receipts with bank statement monthly.

Maintain accounts payable and general ledger support/reconciliation schedules for annual audit review.

Work in conjunction with IT staff and consultants to troubleshoot software issues as needed.

Work in conjunction with Director of Finance and Financial Reporting Accountant to develop procedures for the Finance department to process transactions in a timely and accurate manner.

Provide back-up phone duty service when receptionist is out of office.

On an annual basis change over filing system to current year by moving 2 year old records to storage and setting up new year's files

Process 1099's annually per established procedures and requirements of IRS.

Assist in providing information as requested for annual audit.

Maintain all files for accounts payable, travel vouchers and cash receipts.

Assist Director of Finance and Executive Director as requested.

Develop financial reports through FRx reporting software as needed.

Knowledge/ Skills Required

Basic accounting theory through accounting courses and/or work experience preferably in a multi-company environment (minimum 2 years' experience)

Accounts payable experience preferably in multi company environment (minimum 1 year' experience)

Excel experience

Access experience (ability to design databases preferred)

Experience with Great Plains or other comparable software such as MAS or SAP

Experience with FRx reporting or other comparable financial reporting software (designing reports experience preferred)

Ability to work with variety of software packages including bank reporting and credit card processing,

Ability to troubleshoot software issues as needed

Ability to work in multi-company environment and understand interrelationships between companies

Knowledge of MS Word and Outlook

Detail oriented

Initiative

Multi-tasking

Communication skills

Teamwork attitude